Supreme Court, U.S.
FILED
JUL 22 2002

No. 01-966

In The

Supreme Court of the United States

FRANK O'BANNON, in his official capacity as Governor of Indiana,

Petitioner,

v.

INDIANA CIVIL LIBERTIES UNION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming a preliminary injunction which prevented the Governor of Indiana from erecting on the lawn of the Indiana Statehouse a nearly seven foot high and nearly six ton tablet shaped monument dominated by the text of a version of the Ten Commandments?

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STATEMENT OF THE CASE

The Indiana Statehouse, located in Indianapolis, is the seat of governmental power for the State of Indiana, containing, among other offices, those of the Governor, General Assembly, and the Indiana Supreme Court. (Petitioner Appendix [hereinafter "Pet.App."] 4a). The grounds of the Statehouse are approximately two acres. (Pet.App. 29a).

In March of 2000, Governor O'Bannon announced plans to accept a donated monument containing, among other things, a version of the Ten Commandments. (Pet.App. 71a). The intended monument was to be made of two blocks of Indiana limestone weighing approximately 11,500 pounds. (Pet.App. 64a). The base block of the monument would be rectangular and on top of that would be placed an angled block containing two large faces and two smaller sides. (Pet.App. 64a, 65a). In total the monument would be approximately seven feet high at its highest point and six feet seven inches wide at its widest point. (Pet.App. 64a). The monument would be tablet shaped. (Pet.App. 65a).

One large face of the monument would have inscribed on it the following version of the Ten Commandments.

TEN COMMANDMENTS

I. THOU SHALT HAVE NO OTHER GODS BEFORE ME

II. THOU SHALT NOT MAKE UNTO THEE ANY GRAVEN IMAGE

III. THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN

IV. REMEMBER THE SABBATH DAY TO KEEP IT HOLY

V. HONOR THY FATHER AND THY MOTHER THAT THY DAYS MAY BE LONG IN THE LAND WHICH THE LORD THY GOD GIVETH THEE

VI. THOU SHALT NOT KILL

VII. THOU SHALT NOT COMMIT ADULTERY

VIII. THOU SHALT NOT STEAL

IX. THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOR

X. THOU SHALT NOT COVET THY NEIGHBORS HOUSE OR WIFE OR ANYTHING THAT IS THEY [sic] NEIGHBORS

(Pet.App. 65a-66a). There would be nothing else on this side of the monument. (Pet.App. 66a). The lettering of the text of the Decalogue would be approximately one (1) inch in height. (*Id.*). It is uncertain as to how large the lettering would be which spells out "TEN COMMANDMENTS." (*Id.*).

The other large tablet face of the monument would contain the text of the Bill of Rights under a heading marked "Bill of Rights." (*Id.*). Because the text of the Bill of Rights is longer than that of the Ten Commandments,

the printing of the Bill of Rights would be smaller than that of the Ten Commandments. (Pet.App. 66a, 67a). The text of the Bill of Rights would only be approximately 5/8" in height. (*Id.*).

On one small side of the monument would be an indication that it would be a gift of the Indiana Limestone Industry to replace a former monument. (Pet.App. 67a).[1] The other small side would contain the unattributed text of the Preamble to the Indiana Constitution. (*Id.*).[2]

At the current time, on the almost two acre grounds of the Statehouse there are statues of Christopher Columbus, George Washington, a coal miner, Governor Hendricks and Governor Oliver Morton. (Pet.App. 5a, 64a). There are also a number of ornamental trees with placards indicating that they were donated by former governors. (Pet.App. 29a, 75a). Finally, there are monuments on the grounds honoring the National Road as well as the State capitol itself. (*Id.*).

The proposed monument would be placed on the southwest corner of the Statehouse grounds, near the site of a different Ten Commandments monument which was removed in 1991. (Pet.App. 68a). This area contains only a

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[1] The text would read: "Gift of the Indiana Limestone Industry – 2000 A.D. This monument replaces one donated by the Aeries and Auxiliaries of the Indiana Fraternal Order of the Eagles on October 25, 1958." (Pet.App. 67a).

[2] The preamble states: "To the end that justice be established, public order maintained, and liberty perpetuated: We, the People of the State of Indiana, grateful to Almighty God for the free exercise of our right to choose our own form of government, do ordain this Constitution." (Pet.App. 67a).

tree marked with a placard indicating it was dedicated by former Governor Schricker, as well as a four foot high by two foot wide monument honoring the National Road. (*Id.*). Although the precise location and orientation of the proposed monument is not certain, it would be approximately forty-one feet from Governor Schricker's tree and ninety-two feet from the four foot high National Road monument. (Pet.App. 5a, 75a).

The tablet shape of the monument is unique and unmistakable in that it is the form widely used in artistic depictions of the Ten Commandments. (Pet.App. 33a, 57a). Even if someone is physically removed from the proposed monument so that its text cannot be read, the unique shape will make the monument identifiable from some distance away from the monument. (Pet.App. 57a).

In announcing that he was planning to accept the monument and place it on the Statehouse grounds, Governor O'Bannon stated that the prior Ten Commandments monument, to be replaced by the proposed one, served "as a reminder of some of our nation's core values." (Pet.App. 71a). He also noted that the words of the Ten Commandments and the Bill of Rights and the preamble to the Indiana Constitution are "ideals we all need to be reminded of from time to time." (*Id.*). He also stated that "[t]he new monument will be an integral part of the Statehouse setting, which honors the history of our state and our nation" and that it "will be a wonderful addition to the many historic markers on the Statehouse grounds." (Pet.App. 72a, 74a).

This action was brought by the Indiana Civil Liberties Union and a number of individuals, including two

ministers and a rabbi. The district court granted a preliminary injunction against the Governor placing the monument on the Statehouse grounds, finding that given the Governor's statements concerning the monument and given its design, its purpose was a religious one in violation of the first prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). (Pet.App. 40a-47a). Additionally, the district court found that a reasonable person would conclude, after reviewing the monument and its context, that the Ten Commandments monument was an endorsement of religion by the government which violated both the second prong of *Lemon* as well as *County of Allegheny v. American Civil Liberities Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) and *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). (Pet.App. 47a-58a).

A divided panel of the Seventh Circuit affirmed the granting of the preliminary injunction. The majority found that the articulated purposes for the Ten Commandments monument were not secular and therefore the first prong of *Lemon* was violated since the Governor had failed to articulate a valid secular justification for placing the Ten Commandments, a sacred and religious text for Jews and Christians, on the grounds of the Statehouse. (Pet.App. 7a-9a). The majority also found that the second prong of *Lemon*, and the endorsement test, would be violated by the Ten Commandments monument since a reasonable observer would view the monument as an endorsement of religion. (Pet.App. 9a-13a). This conclusion would be reached if one looked at the Ten Commandments on the monument by itself or in combination with the other documents on the monument. (Pet.App. 11a-12a). Additionally, the majority concluded that

"[n]othing in the context of the monument itself or the surrounding grounds mitigates the religious message conveyed." (Pet.App. 12a). Judge Coffey dissented from the majority's decision. (Pet.App. 13a).

ARGUMENT

Reasons for Denying the Writ

Plenary review in this case is inappropriate for three reasons. First, the Court of Appeals correctly applied settled Establishment Clause jurisprudence in finding that respondents had demonstrated a probability of success on the merits that the Governor's placement of a nearly six ton and seven foot high tablet shaped Ten Commandments monument on the lawn of the Statehouse was a violation of the First Amendment. The Governor merely seeks to correct what he deems to be a misapplication of principles of law upon which all sides agree. Although the Governor asserts that the Court of Appeals misapplied both the secular purpose prong of *Lemon v. Kurtzman, supra,* as well as the endorsement test of *Lynch v. Donnelly, supra,* and *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, supra,* the Court of Appeals' decision is entirely consistent with those decisions and is consistent with Establishment Clause jurisprudence.

Second, plenary review should not be granted to resolve what petitioner characterizes as a conflict with either the Tenth Circuit's opinion in *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973), or the Colorado Supreme Court's decision in *State*

of Colorado v. Freedom from Religion Foundation, 898 P.2d 1013 (Colo. 1994), *cert. denied*, 516 U.S. 1111 (1996). The latter case involved a Ten Commandments display in a completely different context than the one presented in the case at bar and the former case has been questioned and undermined by the very court which issued it. The Court of Appeals decision does not create a current conflict with existing law.

Third, the fact that there are other lower court cases concerning Ten Commandments displays and the fact that there exists interest in some sectors of public life in possibly creating such displays is no reason to grant plenary review when this Court has previously established the principles of law which must be used, in each individual case, to assess the constitutional validity of the displays.

I. The Seventh Circuit's decision in this case correctly recognized and applied this Court's holdings in determining that the proposed monument lacks a valid secular purpose and that, regardless of purpose, it represents an endorsement of religion

A. The Governor seeks plenary review merely to challenge the Seventh Circuit's application of established jurisprudence to the particular facts and circumstances of this case

The test for determining whether religious displays on government property violate the Establishment Clause is set out in *Lemon*. Under *Lemon's* tripartite analysis a challenged governmental practice is constitutional only if: 1) it has a secular purpose, 2) its principal effect neither inhibits nor advances religion, and 3) it does not

foster excessive entanglement.[3] Governmental action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In *County of Allegheny*, a majority of the Court adopted the endorsement analysis presented by Justice O'Connor in her concurrence in *Lynch* which modified the "effects" prong of *Lemon* to ask "whether, irrespective of government's actual purpose, the practice under review, in fact conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 592. *See also, Santa Fe Independent School District v. Doe*, 530 U.S. 290, 307 (2000) (focusing on "[t]he actual or perceived endorsement of the message."). In determining whether an endorsement exists a court must focus on the precise factual context of the matter being challenged since, for example, "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement . . . . " *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). Of necessity, therefore, when a determination is being made as to whether a specific government practice, reviewed in its context,

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[3] In *Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000) (plurality opinion), the plurality noted that to some extent the "excessive entanglement" prong of *Lemon* has been absorbed into the "primary effect" prong. This further refining of *Lemon* is not relevant here since the respondents have never claimed that the challenged Ten Commandments monument creates an "excessive entanglement."

violates the Establishment Clause, "the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch*, 465 U.S. at 678.

The Seventh Circuit properly recognized that this was the law governing the Establishment Clause and that this was the law which had to be applied to determine if the Governor's planned placement of the Ten Commandments monument on the lawn of the Statehouse was unconstitutional. (Pet.App. 7a). The Governor objects because, in his estimation, the Court of Appeals applied this settled law incorrectly. Given that the results of the application will necessarily be altered by the unique facts and context of each display, the fact that, in the Governor's opinion, the Seventh Circuit applied the law incorrectly is not grounds for plenary review.[4] And, the Court of Appeals applied the law correctly.

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[4] A review of recent decisions concerning the display of the Ten Commandments on government property indicates that, regardless of their holdings, courts well understand that they must analyze both the purpose of such displays and whether, based on the specific context, an endorsement of religion or religious belief is created. *See, e.g., American Civil Liberties Union v. McCreary County*, 145 F.Supp.2d 845 (E.D.Ky. 2001), *appeal pending*, No. 01-5935 (6th Cir.) [preliminary injunction granted against displays in courthouses and schools which contained, among other things, the Ten Commandments]; *Kimbley v. Lawrence County, Indiana*, 119 F.Supp.2d 856 (S.D.Ind. 2000) [preliminary injunction issued against Ten Commandments monument on the lawn of a county courthouse]; *Adland v. Russ*, 107 F.Supp.2d 782 (E.D.Ky. 2000), *appeal pending*, No. 00-3139 (6th Cir.) [permanent injunction issued against placing Ten Commandments monument on the grounds of the Kentucky Statehouse]; *American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky*, 96 F.Supp.2d 691 (E.D.Ky. 2000) [preliminary injunction issued against a display of Ten Commandments and

B. Applying this well accepted analysis, the Court of Appeals correctly found that the Ten Commandments monument, in its specific context, would lack a valid secular purpose and would represent an endorsement of religious belief

1. The Seventh Circuit properly found that the monument would lack a secular purpose

In *Stone v. Graham*, 449 U.S. 39, 41 (1980) (*per curiam*), in striking down a Kentucky statute which required the posting of the Ten Commandments in classrooms, the Court stated the obvious when it indicated that the Ten Commandments is an "undeniably sacred text in the Jewish and Christian faiths . . . . " Given the clear religiosity of the Ten Commandments, the Seventh Circuit placed the burden on the Governor to demonstrate a secular

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other documents in county courthouse]; *Doe v. Harlan County School District*, 96 F.Supp.2d 667 (E.D.Ky. 2000) [preliminary injunction issued against posting of Ten Commandments and other documents containing references to God and the Bible in a public school]; *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 96 F.Supp.2d 679 (E.D.Ky. 2000) [preliminary injunction issued against posting Ten Commandments and other documents in county courthouse]; *Suhre v. Haywood County, North Carolina*, 55 F.Supp.2d 384 (W.D.N.C. 1999) [allowing a courtroom display containing, among other things, an abridged version of the Ten Commandments]; *Harvey v. Cobb*, 811 F.Supp. 669 (N.D.Ga. 1993), *aff'd without opinion*, 15 F.3d 1097 (11th Cir.), *cert. denied*, 511 U.S. 1129 (1994) [display of Ten Commandments in a courthouse was not in an educational display and was unconstitutional].

purpose. (Pet.App. 8a).[5] The Governor does not argue that it was erroneous to place this burden on him.

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[5] The Governor appears to argue that the Court of Appeals erred in finding that the Ten Commandments was "inherently religious" (Pet.App. 9a), citing Russell Kirk for the proposition that the Ten Commandments had a major influence on the development of Western law and civilization. RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER (1974). However, there are numerous scholars and historians who disagree with this assertion. *See, e.g.*, Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 THE JOURNAL OF LAW AND RELIGION 525, 558 (1999-2000) [concluding that "[t]he historical record fails to support claims of a direct relationship between the law and the Ten Commandments."]; ISAAC KRAMNICK AND R. LAURENCE MOORE, THE GODLESS CONSTITUTION – THE CASE AGAINST RELIGIOUS CORRECTNESS 27-28 (1996) [noting the controversy at the time of the passage of the Constitution over the concerted and successful effort to make the Constitution a secular document]. Indeed, no less an important figure than Thomas Jefferson undertook to refute the misconception that the English common law was somehow based on Mosaic law by noting that the English common law predated the introduction of Christianity to England and that subsequent thereto Christianity simply was not adopted as a part of the common law. Letter from Thomas Jefferson to Dr. Thomas Cooper (February 10, 1814), *in* THOMAS JEFFERSON – WRITINGS, at 1321-1329 (Merrill D. Peterson ed. 1984). Jefferson further stated that "in answer to Fortescue Aland's question why the ten commandments should not now be a part of the common law of England? we may say that they are not because they never were made so by the legislative authority, the document which has imposed that doubt on him being a manifest forgery." *Id.* at 1329.

Although the question of the legal influence of the Ten Commandments may be debated, there is no doubt that the Ten Commandments is a living and meaningful holy document for Christians and Jews who gaze upon its words as the revealed truth from God and not as some sort of historical predecessor to

Instead, he argues that the Seventh Circuit misapplied the relevant test by requiring the Governor to demonstrate that his purpose was primarily secular and in failing to honor his statement of secular purpose. The Governor errs.

Under the first prong of *Lemon* "we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged." *Agostini v. Felton*, 521 U.S. 203, 223-24 (1997). Although the Court of Appeals stated that "the display of secular texts along with the Ten Commandments does not automatically lead to a finding that the purpose in erecting the monument is primarily secular" (Pet.App. 9a), the Court of Appeals did not indicate that it was requiring the Governor to demonstrate that the erecting of the monument was primarily for a secular purpose. Instead, the Court of Appeals properly stated that the question was whether the actual purpose of the planned monument was "to advance or inhibit religion." (Pet.App. 7a). And, the Court of Appeals noted that it was the Governor's obligation to demonstrate "a valid secular justification for planning to erect the monument." (Pet.App. 9a).

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our secular law today. There simply can be no dispute that at its core the Ten Commandments is a "sacred text." *Stone*, 449 U.S. at 42. Therefore, any discussion as to its display by the government must start with the realization that there must be a valid secular purpose to overcome this religiosity. As the Court of Appeals recognized, this is not an impossible burden (Pet.App. 7a-8a), but it is not a burden which the Governor met in this case.

In assessing the purpose, the Court of Appeals followed this Court's pronouncement that it is not enough for the State to enunciate a secular justification since, "[w]hen a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the court to 'distinguis[h] a sham secular purpose from a sincere one.' *Wallace [v. Jaffree]*, 472 U.S., at 75 (O'Connor, J., concurring in the judgment)." *Santa Fe Independent School District v. Doe*, 530 U.S. at 308. Therefore, it was proper for the Court of Appeals to examine the Governor's enunciated purposes for allowing a nearly six ton and seven foot high monument dominated by the text of the Ten Commandments to be placed on the grounds of the Indiana Statehouse.

Two of the reasons noted by the Governor are overtly religious: the Ten Commandments serve as a reminder of the "core values" of the United States and they contain "ideals" which we all need to be reminded of from time to time. As this Court noted in *Stone*, the values promoted by the Ten Commandments are religious values and the ideals are religious ones.[6]

As a third reason, the Governor proclaimed that the Ten Commandments are part of the legal and cultural

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[6] "The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. . . . Rather, the first part of the Commandments concern the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Stone*, 449 U.S. at 42.

history of the United States. However, in *Stone*, this Court specifically held that merely asserting, even in a writing that accompanied the posting of the Decalogue, the secular and historical significance of the Ten Commandments was not enough to overcome its religiosity; this " 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." 449 U.S. at 41. As in *Stone*, the Court of Appeals rejected the notion that merely saying the Ten Commandments was posted for a historical and secular reason is sufficient to dispel the religiosity of the document when the context does not confirm this purpose. There must be some demonstration from the context of the Ten Commandments that it is posted for historical or cultural purposes. Not only would the planned monument not be linked either in a visual or explanatory way with the other texts on the monument, there would be no link whatsoever between the Ten Commandments and the other material on the lawn of the Indiana Statehouse. The proposed site for the monument sits closest to a monument honoring the National Road and a tree planted by a former governor. There simply is nothing in the Ten Commandments monument which suggests a historical purpose other than the Governor saying so. This is not enough to create a secular purpose.[7]

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[7] The trial court specifically found that:

> at oral argument, the State was unable to elucidate any historical link between most of the commandments and "ideals animating American government." Counsel for the State, when asked about each individual commandment, was unable to provide any historical linkage between seven of the

2. The Seventh Circuit properly found that the nearly seven foot high and nearly six ton monument in the familiar tablet shape of the Ten Commandments, located at the seat of governmental power in Indiana, would convey a message of endorsement of religion

Under the effects prong of *Lemon*, as refined by the endorsement analysis, a court must determine "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690 (O'Connor, J.,

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commandments and only weak historical links to three of them.

(Pet.App. 44a-45a). The district court further noted that:

> The only Commandments the State was able to link historically to legal or core values and ideals were "thou shalt not kill," "thou shalt not commit adultery," and "thou shalt not bear false witness against thy neighbors." However, even the links to these commandments were quite attenuated, as the State itself acknowledges that killing, in and of itself, is not illegal (moreover, the State itself authorizes death as punishment for certain crimes under certain circumstances), the links to adultery are found in statutes that are no longer on the books, and bearing false witness is only incorporated into our legal system to the extent that sworn witnesses are subject to perjury if they lie. Counsel also conceded that any association between the Second Commandment and old "Blue Laws" which in past times required certain commercial establishments to be closed for business on Sundays, and other such historical vestiges of the old sabbatic laws, is a stretch, and certainly not an expression of any "core" value or ideal.

(Pet.App. 45a).

concurring). In *County of Allegheny*, 492 U.S. at 597, this Court noted that "the effect of the government's use of religious symbolism depends on its context." In reviewing the context, the Court of Appeals in this case noted the obvious; the planned monument would not be in "some museum nestled in some secluded park" . . . [it would be at] the seat of Indiana government . . . . " (Pet.App. 10a).[8] Given this prominent location, "a reasonable observer would think that this monument, regardless of the message it conveys, occupies this location with the support of state government." (Pet.App. 10a-11a). The Court of Appeals correctly found that the reasonable observer would conclude that the monument conveys a religious message.

Looking solely at the monument itself, a reasonable observer would see a permanent, large and massive monument carved in the shape of the Ten Commandments and dominated by the text of the Decalogue. The shape of the monument is distinctive enough that it would be identifiable to any one who perceives its nearly seven foot high tablet shape from anywhere on the grounds of the Statehouse. "No viewer could reasonably think that it occupies this location without the support and approval of government." *County of Allegheny*, 492 U.S. at 599-600. The placement of a religious symbol at, or on, the seat of

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[8] The planned monument is therefore unlike the creche displayed in *Lynch* which was placed in a park. It is also unlike the Christmas tree and Menorah in *County of Allegheny* since the Court found that those symbols themselves have both secular and religious dimensions. 492 U.S. at 613-614. The Ten Commandments, like a creche, is unambiguously religious, although its religiosity can be mitigated by its context.

governmental power "[p]rovides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982).

A reasonable observer, viewing the monument itself, would not see anything to mitigate the religious message conveyed by the Ten Commandments. Even if the reasonable observer stops to look at the monument, as opposed to just recognizing it as a Ten Commandments monument from its shape, the reasonable observer would note that the most prominent document on the monument is the Ten Commandments. There is nothing which would serve to link the Bill of Rights, perhaps America's most important living and vibrant legal document, with a living and vibrant religious document which is sacred and holy to Jews and Christians other than the inevitable conclusion that these are two documents which the State of Indiana has deemed to be extremely important. This is endorsement.[9]

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[9] Of course, if a display of historical lawgivers was created, placing the Ten Commandments next to other laws and lawgivers throughout history might well mitigate the religious nature of the Ten Commandments. *See, e.g., County of Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring and dissenting). But, the Governor's repeated comparison of the Ten Commandments monument to the frieze in this Court is not accurate. The frieze on the walls of this Court which depicts Moses holding the Ten Commandments does not contain just Moses with figures from America's legal history. Instead it depicts lawgivers from throughout history including: Menes, Hammurabi, Solomon, Lycurgus, Solon, Draco, Confucius, Augustus, Napoleon, John Marshall, William Blackstone, Hugo Grotius, Saint Louis, King John, Charlemagne, Mohammed and Justinian. SUPREME COURT HISTORICAL SOCIETY, SUPREME COURT OF THE UNITED STATES 31. The placement of the Ten Commandments in the frieze is not an

Allegheny is clear; in determining context one must look to the distinct display. 492 U.S. at 598, n. 48. The distinct display here is the nearly six ton monument. However, the endorsement is not lessened even if the monument is viewed in the context of all the other items on the Statehouse lawn. There simply is nothing that would compel or allow a reasonable person to see some common historical link between the Ten Commandments and, for example, a statue of George Washington, a statue of Governor Hendricks, and a plaque commemorating the National Road. Merely placing a religious display with statues of important historical figures and commemorative plaques does not remove the endorsement present when the government places a religious display on public property. If the religiosity of the document is to be mitigated by context it must be placed into a context that has some unifying historical, legal, or other non-religious theme. The display that a reasonable observer would see when looking at the Statehouse has no unifying historical theme, or any other theme. The reasonable observer will see the Ten Commandments as a religious display, different from the statues and plaques.

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acknowledgment of any role that the Ten Commandments has had in the development of American law; it merely recognizes "great lawgivers." *County of Allegheny*, 492 U.S. at 653. (Stevens, J., concurring and dissenting).

But, when the Ten Commandments are placed next to the Bill of Rights, given that there is no natural connection between the two, the only reasonable conclusion which can be drawn is that the State of Indiana intends that its citizens honor and revere both. *County of Allegheny* does not stand for the proposition that any religious display can be "secularized" if it is displayed near something else.

C. The display of the Ten Commandments is not analogous to legislative prayer nor does it represent a common secular heritage

Eschewing *Lemon* or the endorsement analysis, the Governor argues that inasmuch as legislative prayer is allowed, *Marsh v. Chambers*, 463 U.S. 783 (1983), and inasmuch as ceremonial reference to God has been found in some circumstances to be constitutionally acceptable as expressing a cultural and secular message, rather than a religious one, the posting of the Ten Commandments must be deemed to be appropriate. In *Marsh*, this Court noted that there had been a long acceptance of legislative prayer and that legislative prayer had been in existence at the time that the Constitution was adopted. 463 U.S. at 792. *Marsh*, however, has been restricted to its particular facts, and is not useful here since, among other things, there is absolutely no evidence that the posting of Ten Commandments monuments was accepted at the time of the Constitution. *Edwards v. Aguillard*, 482 U.S. at 583, n. 4.

The posting of this sacred text is not a memorial to some common secular "heritage." Nor is it "cultural." Posting a document holy to Christians and Jews is directly contrary to what this Court has noted is our real heritage.

> This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent . . .
>
> Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress

> shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . " Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Wallace v. Jaffree*, 472 U.S., at 52 . . . .

County of Allegheny, 492 U.S. at 590. The Court of Appeals correctly affirmed the trial court's grant of an injunction.

II. Contrary to petitioner's assertion, there is no significant conflict in the lower courts on the issue presented in this case

A. The proposed circuit conflict

In an attempt to manufacture a circuit conflict, the petitioner cites to only one circuit court case, *Anderson v. Salt Lake City Corp., supra*, which it claims is arguably in conflict with the Seventh Circuit's decision. In *Anderson*, a decision from 1973, the Tenth Circuit found that a three by five foot granite Ten Commandments monument erected on the city-county courthouse grounds was not a violation of the Establishment Clause. In so holding, the court concluded that the purpose and the primary effect of the monument were not religious. 475 F.2d at 34. The court held that the Ten Commandments has both secular and religious attributes. 475 F.2d at 33. The court also noted that there was nothing coercive about the display. *Id.*

Anderson preceded *Stone*. In *Stone* this Court specifically noted that, posted by itself, the Ten Commandments is a religious text without secular purpose.

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20:12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20:1-11; Deuteronomy 5:6-15.

449 U.S. at 42.

In *Summum v. Callaghan*, 130 F.3d 906, 912, n. 8 (10th Cir. 1997), the Tenth Circuit was asked to overrule *Anderson*, but found it unnecessary to do so since it found that the district court's decision could be reversed on other grounds. However, the court quoted the above passage from *Stone* and noted that "[w]e are not at liberty to overrule or disregard the precedent of an earlier panel absent en banc reconsideration or a superseding contrary decision of the United States Supreme Court . . . . We note, however, that our decision in *Anderson* has been called into question by the Supreme Court in *Stone v. Graham*." *Id.* (Internal citations omitted).[10] Given that the

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[10] Other courts have agreed that, after *Stone*, the continuing validity of *Anderson* has been called into doubt. *See, American*

1980 decision in *Stone* undercuts the validity of the 1973 decision in *Anderson* and the court that issued *Anderson* doubts its continued validity, there is not a significant conflict between *Anderson* and the Court of Appeals' decision in this case which justifies the grant of plenary review.[11]

B. The proposed conflict with a decision of a state court of last resort

Petitioner argues that the Seventh Circuit's decision conflicts with one decision of a state court of last resort, *State of Colorado v. Freedom from Religion Foundation, supra.* In *Freedom from Religion Foundation,* the Colorado Supreme Court, by a 4-3 margin, upheld as constitutional a relatively small (2-4 feet by 2½ feet) Ten Commandments monument. 898 P.2d at 1016. The monument was placed into a park that is part of a three block complex of public property, which includes the park and the grounds of the state capital. 898 P.2d at 1015. Throughout the park were large historical statues and memorials. 898 P.2d at

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Civil Liberties Union v. McCreary County, Kentucky, 145 F.Supp.2d at 847, n. 6; *Kimbley v. Lawrence County,* 119 F.Supp.2d at 871, n. 10; *American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky,* 96 F.Supp.2d at 700.

[11] The *Anderson* decision is also questionable to the extent that it focuses on whether the display was coercive. Although coercive efforts by the Government may lead to an Establishment Clause violation, *see, e.g., Lee v. Weisman,* 505 U.S. 577 (1992), there is no requirement that an Establishment Clause violation be predicated on coercion. *County of Allegheny,* 492 U.S. at 597, n. 47; *School District of Abington Township v. Schempp,* 374 U.S. 203, 223 (1963).

1015-1016. The court examined the context of the monument and noted that it was placed inconspicuously into a park, "where citizens may be found by choice and are not necessarily present for purposes related to government." 898 P.2d at 1025. The Governor's Ten Commandments monument would neither be inconspicuous, nor in a spot unrelated to government. Obviously, the opposite is true. The monument would be on the grounds of the Statehouse, near a walkway leading directly into the Statehouse itself. (Pet.App. 75a). Its size and shape would guarantee that it would be conspicuous. Thus, like the Court of Appeals' decision below, the Colorado decision recognizes that context is a critical element in the Establishment Clause analysis. For that reason, it is entirely plausible that the Colorado Supreme Court would have reached a different conclusion if the monument there, like the monument here, had been conspicuously displayed on the property of a governmental building where citizens were forced to come into direct and unwelcome contact with it in the course of their civic activities. The Colorado decision, presenting an entirely different factual circumstance and context than this one, does not justify this Court granting plenary review in this case.

III. The fact that there are other Ten Commandments cases in the lower courts and that some state and local governments are interested in displaying the Ten Commandments is not a reason for granting plenary review

As the Governor demonstrates in his petition, the issue of the public display of the Ten Commandments is one which a number of lower courts and state and local

governments are facing. (*See* Petition at 11-13). However, this Court's Establishment Clause jurisprudence has set out the analysis which must be used to assess the constitutional validity of such displays and has emphasized that this inquiry must be context based and tailored to the precise circumstances of the display. *Lynch*, 465 U.S. at 678. No *per se* rule can be expressed indicating that the Ten Commandments can never, or can always, be displayed. Instead each case must be examined separately. And that is what the lower courts and the government entities are undoubtedly doing. Given that there is no significant conflict in the lower courts, the fact that lower courts have Ten Commandments cases pending or that this is an issue which state and local governments are considering is simply not a reason to grant plenary review. There is no further explication of the law which would change the context based inquiry that must be made in each case.

CONCLUSION

Certiorari is not warranted. The Court of Appeals' analysis conformed to the context based inquiry demanded by this Court. There is no meaningful conflict with prior decisions of a circuit court or state supreme court. The fact that there are other Ten Commandments cases in the lower courts, and interest in posting the Ten Commandments in various state or local governments, does not create a basis for the granting of plenary review inasmuch as this Court has established the test to be used

to judge the validity of the display of the Ten Commandments in those cases. Since there are no grounds for granting the petition, it should be denied.

Respectfully submitted,

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